Case and Comment

INTERNATIONAL LAW — KOREA — UNITED NATIONS — VALIDITY OF RESOLUTIONS OF THE SECURITY COUNCIL — TWO VIEWS.

No matter how much one may sympathize with the actions taken by the Security Council of the United Nations in the case of Korea, up to the time when the representative of the U.S.S.R. returned to his seat in the Council, and welcome the prompt and effective decisions of that body when faced with a major crisis in international relations, it is difficult to establish that the decisions of the Council, on a strict interpretation of the Charter, were legally taken.

The principal decision referred to is that contained in the resolution adopted by the Council on June 25th, 1950, by which the Council *inter alia* declared the attack on the Republic of Korea to be a breach of the peace, called for an immediate cessation of hostilities and ordered the North Korean authorities to withdraw their forces to the thirty-eighth parallel.[1] This resolution was adopted by a vote of nine to zero, the representative of Yugoslavia abstaining and the representative of the U.S.S.R. being absent.

The decision taken was clearly one of substance and not of procedure within the meaning of article 27 of the Charter — it was a decision under paragraph 2 of article 39 to bring into operation the procedure established by chapter VII for restoring international peace and security. Paragraph 2 of article 27 provides that decisions of the Council on all matters other than procedural "shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI,[2] and under paragraph 3 of Article

[1] U.N. Doc. S/1501. There is no need in this note to give details of the later resolutions adopted by the Council in the absence of the representative of the U.S.S.R., particularly the resolutions of June 27th and July 7th, 1950 (U.N. Docs. S/1511 and 1588 respectively). The remarks made apply equally to these resolutions.

[2] Pacific Settlement of Disputes.

52,[3] a party to a dispute shall abstain from voting". The representative of the U.S.S.R., one of the five permanent members of the Council, having been absent, the decision lacked the concurring vote of that member. Despite this fact, the President of the Council declared the resolution carried and none of the representatives present at the meeting raised any objection.

It is strange that neither did any of the Members of the United Nations not represented in the Security Council, including the U.S.S.R., raise any objection concerning the validity of the resolution of June 25th, 1950, until after the Council had adopted its resolution of June 27th recommending that the Members of the United Nations assist the Republic of Korea. This resolution was also carried in the absence of the representative of the U.S.S.R. Czeckoslovakia on June 29th, 1950, informed the Secretary-General that it considered the resolutions of June 25th and 27th to be illegal as they lacked "the necessary unanimity of all the permanent members of the Security Council".[4] The U.S.S.R. similarly informed the Secretary-General on the same day and Poland did likewise on June 30th, although the communications forwarded by the two latter members contained no reference to the resolution of June 25th.[5] The great majority of the other Members of the United Nations informed the Secretary-General that they approved or accepted the resolutions.

On June 30th, 1950, the State Department of the United States Government issued a statement replying to the allegations of Czeckoslovakia, the U.S.S.R. and Poland that the resolutions of the Security Council had no legal force.[6] This statement pointed out that, notwithstanding the provisions of article 27 of the Charter, "by a long series of precedents . . . dating back to 1946, the practice has been established whereby abstention by permanent members of the Council does not constitute a veto. In short, prior to the Soviet allegations, every member of the United Nations, including the U.S.S.R., accepted as legal and binding decisions of the Security Council made without the concurrence,

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[3] Which deals with encouragement by the Council of the pacific settlement of local disputes through regional arrangements or regional agencies.

[4] U.N. Doc. S/1523.

[5] U.N. Docs. S/1517 and 1545 respectively. The communications received from Czeckoslovakia, the U.S.S.R. and Poland each cited as an additional reason for the invalidity of the resolutions the lack of the concurring vote of China, another of the permanent members of the Council. Any examination of the soundness of this contention is outside the scope of this note. In any event the question of the recognition of Communist China and its entry into the United Nations has been the subject of much recent literature.

[6] "United States Policy in the Korean Crisis", Department of State, Washington, pp. 61 *et seq.*

as expressed through an affirmative vote, of all the permanent members of the Council". The statement later gave an impressive list of the principal precedents referred to. These included four decisions in connection with Palestine, four decisions in connection with Kashmir and two decisions in connection with Indonesia. In each of these instances where it is clear that decisions of substance were involved the representative of the U.S.S.R. abstained when a vote was taken and raised no objection when the President declared the resolutions carried. The statement also cited three decisions of the Council, also clearly decisions of substance, such as the admission of Israel to the United Nations, where permanent members other than the U.S.S.R. abstained when a vote was taken and the representative of the U.S.S.R. implicitly accepted the validity of the Council's action. It was also maintained in the statement that "The voluntary absence of a permanent member from the Security Council is clearly analogous to abstention. Furthermore Article 28 of the Charter provides that the Security Council shall be so organized as to be able to function continuously. This injunction is defeated if the absence of a permanent member is construed to have the effect of preventing all substantive action by the Council."

The statement of the State Department was supported by the leaders of several other Western countries, notably by the Prime Minister of the United Kingdom and by the Australian Minister for External Affairs, the former in the House of Commons on July 5th, 1950, the latter in a press statement issued about the same time. These leaders did not adduce any arguments additional to those made by the State Department to support their common opinion. In examining the force of the case made in reply to the allegations of the U.S.S.R. and its allies it is sufficient, therefore, to concentrate upon the text of the statement issued by the State Department.

A person acquainted with the history of the Security Council cannot deny that from the time the representative of the U.S.S.R. walked out of the Council when the question of Iran was being discussed in 1946 until the Korean crisis arose a clear-cut practice had been evolved to enable the Council to function without the positive agreement of a permanent member or even members. This practice permitted a permanent member which could not endorse a substantive decision which would otherwise have been taken to abstain and that abstension was regarded as not constituting a veto. In other words, the veto could be exercised only by a negative vote, not by an abstention. This practice was ac-

cepted by all the permanent members of the Council, including the U.S.S.R., and was never challenged by any other Member of the United Nations. The Council had operated in accordance with it for a considerable time. It is also true that dating from the withdrawal of the representative of the U.S.S.R. from the Council in 1946 the voluntary absence of a member from the Council when a vote was taken has been regarded as equivalent to an abstention. Although this interpretation does not have the same wealth of precedent to support it, it seems entirely logical and it also has never been challenged.

Even if the actions of the Council regarding Korea accorded with its practice, does it then follow, as the great majority of the Members of the United Nations apparently believe, that those actions were legal? To answer this question the relevant provisions of the Charter must first be consulted. After doing so, it seems evident that the Council in taking the decisions under consideration did not act in a manner consistent with the Charter. The meaning of article 27 of the Charter is plain to see — decisions of the Council on matters other than procedural require the affirmative votes of the five permanent members. In the case of the decisions regarding Korea one permanent member did not cast an affirmative vote. That it did not do so because it was not represented in the Council at the appropriate times or that it failed to observe its obligations under the Charter by not being so represented is irrelevant. The essential fact is that it did not concur in the decisions which were therefore not taken in the prescribed manner.

If any further evidence is needed that the practice of the Council in this respect conflicts with the provisions of the Charter, attention may be drawn to the proviso in paragraph 3 of article 27. This proviso contains an exception to the rigid requirement of the unanimity of the five permanent members when decisions are taken on matters of substance. By virtue of this proviso the Council is authorized to take decisions of substance even if a permanent member or members abstain, but only in two specified cases and in these two cases permanent members are obliged to abstain. It would appear to follow from this proviso that no other exceptions to the rule of unanimity were intended by the draftsmen of the Charter.

The conflict between the provisions of the Charter and the practice of the Council having been established, the weight placed upon the practice of the Council by the State Department remains to be considered further. The State Department did not

make clear in its statement its opinion as to the legal connection between the provisions of the Charter and the practice of the Council. Nevertheless, there are only two possibilities — either the practice amounts to an interpretation of the Charter or it amounts to an amendment. Can the practice of the Council be said to amount to an interpretation? It is a recognized rule of interpretation in international law that when the meaning of a provision is in doubt the interpretation put upon it in practice by the parties may be taken as a guide to their intention. But the language used in article 27 of the Charter leaves no room for doubt as to the intention of the draftsmen. Furthermore, the Council has never expressed the view that the meaning of article 27 is not clear. The position is the same with other guides to interpretation, such as resort to the *travaux préparatoires*. The International Court of Justice recently ruled that when the meaning of a provision is clear on the face of it resort cannot be had to the *travaux* to show that another meaning was intended.[7]

If the practice of the Council cannot then be said to amount to a legitimate interpretation of the Charter, can it be said to amount to an amendment? In point of fact it is, of course, an amendment of the voting requirements laid down in article 27. To this amendment all the Members of the United Nations, including the U.S.S.R., previously and tacitly agreed. But can this amendment in point of fact be regarded as an amendment in point of law? The rule of contract in Anglo-Saxon law which requires any amendment to a written instrument to be made in writing cannot be said to be definitely established in international law. However, the solemn nature of the Charter of the United Nations appears to suggest that any amendment of its terms should be in writing and should be formally approved by the Members. In addition, article 108 of the Charter prescribes a rigid procedure for amendments, including the requirement that each permanent member of the Security Council must ratify the amendment before it can enter into force. The implication of this provision is that it is the exclusive means of amending the Charter, that other means are not permissible.

The remaining argument upon which the statement of the State Department was based, namely the injunction contained in article 28 of the Charter, appears to be of doubtful force. Article 28 deals with the procedure of the Council — it is the first of a series of five articles of the Charter grouped under the heading

[7] Advisory opinion on the Admission of a State to the United Nations, International Court Reports, 1948.

"Procedure". Paragraph 1 is the relevant provision of the article and that paragraph refers to the *organization* of the Council. The key parts of this paragraph are the word "continuously" and the second sentence which requires members of the Council to be represented at all times at the seat of the United Nations in order that the Council may function continuously. This word and sentence indicate that the intention of the paragraph is "to give additional assurance that the Council will be able to function *promptly* when the occasion arises".[8] In other words what the paragraph is concerned with is the capacity of the Council to act quickly at all times, not with whether the Council can function at all. In view of this fact it would seem to be going too far to interpret article 28 as enabling the Council, if the representative of a permanent member deliberately absents himself, to proceed as it normally would. The possibility that a permanent member would deliberately absent itself from the Council was never envisaged at the San Francisco Conference which took the unanimity of the permanent members as the foundation upon which the machinery of the Security Council and the United Nations itself was to be erected. Undoubtedly, if such a situation occurs, the absent member has broken its obligations under the Charter, obligations placed upon it by paragraph 1 of article 24,[9] read in conjunction with paragraph 1 of article 28. This, however, is beside the point and cannot justify an attempt to write into article 28 a meaning it was never intended to have.

To sum up, the reasoning of this note would seem to point to the conclusion that, questions of policy apart, the decisions taken by the Security Council in the Korean crisis until the return to the Council of the representative of the U.S.S.R. (and, *semble*, a number of other decisions in different connections) are not legally sound. They were taken pursuant to a voting procedure other than that prescribed by the Charter. This procedure was consistent with the previously unchallenged practice of the Council. However, this practice cannot be regarded either as a legitimate interpretation of the provisions of the Charter or as having in proper fashion amended those provisions.

Despite the fact, therefore, that Mr. Gromyko appears to have been correct when he described the decisions taken by the

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[8] Italics by the author. "A Commentary on the Charter of the United Nations", by Goodrich and Hambro, p. 228.

[9] This provision confers on the Security Council "primary responsibility for the maintenance of international peace and security" and the Members agree therein that in carrying out this task the Council acts on behalf of them.

Security Council in the case of Korea as illegal, the actions of the U.S.S.R. in this instance provide a striking illustration of the opportunistic and selfish fashion in which that country participates in the work of the United Nations. It is evident that the only reason why the U.S.S.R. did not previously challenge the practice of the Council of not regarding the abstention of a permanent member as a veto is that the occasions on which this practice was previously followed did not concern the vital interests of the Soviet Union.

JOHN DOE*

The Editor has given me an opportunity of reading in advance of publication a note, ascribed to Mr. John Doe, which attacks the legal validity of the Security Council's recent decisions with respect to the conflict in Korea. Since I am no longer associated with the Department of External Affairs, any remarks of mine will have no official significance. I therefore cheerfully assume the rôle of Richard Roe on this occasion.

Mr. Doe concedes that under article 27 of the Charter, as it has been applied in practice, an abstention by one of the permanent members of the Security Council during any vote on a question of substance constitutes a measure of concurrence in that decision sufficient to satisfy the provisions of article 27. He also concedes that the Council has, also in practice, proceeded on the assumption that it is not precluded from making substantive decisions during the gratuitous absences of the Soviet representative. He concedes further that no Member of the United Nations questioned the validity of the Council's resolution of June 25th, 1950, until after the Council had adopted its further resolution of June 27th, 1950, which recommended that Members of the United Nations assist the Republic of Korea. Despite these large concessions, Mr. Doe stands by the language of article 27 and concludes that no decision of the Security Council on any matter of substance can be legally valid without the affirmative votes of the five permanent members of the Council.

I confess surprise that the author, when he reached the delicate point at which a lawyer must decide "yea" or "nay", did not incline in favour of the validity of the Council's decisions. I

*EDITOR'S NOTE.—The Editor thinks that on this occasion circumstances justify a departure from the Review's policy against the publication of material under a pseudonym. The subject of the note is important and the author, whose qualifications are favourably known to him, has adequate personal reasons for wishing to remain anonymous.

say this because there can be little question of the moral validity of the decision. A properly constituted United Nations body had found that an act of aggression had been committed against the Republic of Korea; the voluntary and fortuitous exile of the Soviet representative was a factor which the other members of the Council were unable to prevent or anticipate; and the Security Council was still charged with its important responsibilities in the field of international peace and security. The Council in fact took what most people would agree was the only practical course in the circumstances. Since the impugned decisions of the Council are supported by considerations of both moral and common sense, it seems to me that in the minds of experienced lawyers a considerable presumption would be created in favour of the validity of the Council's decisions, despite the apparent intention of article 27 when that article is considered in isolation.

In order to conclude that the decisions were legally valid, it is not necessary to make concessions as numerous as those which Mr. Doe generously made before reaching the conclusion that he in fact reached. It is necessary to concede only that the language of article 27, if given a narrow construction without reference to other provisions of the Charter or to any more general canon of interpretation, means that the affirmative vote of each of its five permanent members is necessary for any decision of the Security Council which is other than procedural.

But is it true that the intention of article 27 is perfectly clear in its application to a situation in which a permanent member of the Council, having been notified of a meeting, deliberately fails to show up? If there is any element of doubt about this, then, even on a literal-grammatical construction, the force of Mr. Doe's arguments — and they are models of lucidity — is considerably weakened. The intention of article 27 must of course be derived from a reading of that article in its context, and article 28 recites both that the Council "shall be so organized as to be able to function continuously" and that "each member of the Security Council *shall for this purpose* be represented at all times at the seat of the organization". This I think establishes — and I have referred only to the words of the Charter, and not at this stage to the *travaux préparatoires* or to other extraneous sources — that the assumption underlying article 27 is that each member of the Council will in accordance with the Charter attend the meetings of the Council. In a situation in which the state of facts assumed by article 27 does not exist, can it be said that the real intention of the voting provisions of that article is perfectly clear? I submit

that there is an element of doubt as to the real intention sufficient to justify a more liberal approach to its interpretation.

The Charter, as the Prime Minister of Canada has pointed out, is a treaty in the nature of a constitution. As such, at least when there is the slightest doubt as to the *litera legis*, it must be construed as constitutions are construed — liberally, and in the manner best calculated to promote rather than to defeat the purposes for which the organization was established. Accordingly, it is proper in this instance to consider related provisions in the Charter, the construction which has been placed upon the provision in practice, and in particular the purposes of the Charter, in determining the true intention of article 27 in its application to a set of facts such as those existing in June last. The application of these principles leads me to the conclusion that the Council's decisions of June last, in the circumstances then existing, were legally as well as morally sound.

The first Purpose — the word is capitalized in the Charter — of the United Nations is "to maintain international peace and security and to that end to take effective collective measures for . . . the suppression of acts of aggression or other breaches of the peace". Moreover, as I have mentioned, article 28 provides that the Security Council shall be so organized as to be able to function continuously. Again, article 24(1) confers on the Security Council "primary responsibility for the maintenance of international peace and security". These provisions could hardly operate or have real meaning if any permanent member of the Council were able to disrupt the continuous functioning of the Council by simply instructing its delegate not to appear at its sessions.

I therefore conclude that the broader construction placed upon article 27 by the members of the Security Council after the walk-out of the Soviet delegate is correct. In this view of article 27, if a permanent member of the Security Council voluntaril absents itself from the sittings of the Council, its action or inaction constitutes a degree of concurrence in the decisions then taken by the Council sufficient to satisfy the requirements of article 27 of the Charter. This construction does not of course abolish what has been called the "veto". It would however require every permanent member of the Council opposing a resolution to appear in the Council Chamber and vote against it. I cannot believe that this is a serious disability or one of which any permanent member of the Council could reasonably complain.

E. RUSSELL HOPKINS

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NEGLIGENCE — LIABILITY OF LAND OWNER — INFANT VICTIM — DOCTRINE OF ALLUREMENT — FUNCTION.— A recent Ontario case[1] invites a re-examination of the tortious liability of an owner of land and, particularly, the so-called doctrine of allurement where the victim of the casualty is an infant of tender years. No better general statement of the law of the liability of a landowner to those who come on his land can be found than that of Lord Hailsham L.C. in *Addie (Robert) & Sons (Collieries) Ltd.* v. *Dumbreck*:[2]

> There are three categories in which persons visiting premises belonging to another person may fall; they may go
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> (1) By the invitation, express or implied, of the occupier;
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> (2) With the leave and licence of the occupier, and
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> (3) As trespassers.
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> It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or Scotch law, and I do not think that the category exists.
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> The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe.
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> In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent — the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known — or ought to be known — to the occupier.
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> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.

In that case the decision went against the infant. But in the following year the House of Lords had again to consider the question[3] and on the facts reached an opposite conclusion. Since in each of these cases the victim was an infant of tender years and the accident arose out of a system of cable haulage of trucks

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[1] *Riopelle* v. *Desjardins*, [1950] O.R. 93.
[2] [1929] A.C. 358, at pp. 364-5.
[3] *Excelsior Wire Rope Co.* v. *Callan*, [1930] A.C. 404.

on a railway line, it is only natural that there should be some confusion as to the state of the law and why in two superficially similar cases the House should reach opposite conclusions. Indeed, later in the same year as the latter decision, Scrutton L.J.[4] endeavoured to reconcile the cases by saying:

> The only distinction between these two cases, so far as I can see, is that in *Addie's* case the people who set the wire rope in motion were down a hill at a place from which they could not see the wheel and the children who were beside it, while in the *Excelsior Wire Rope Co.'s* case the man who gave the signal to start the wheel was standing only about twenty yards away from it, and could have seen it and the children if he had looked round without moving from his position. Whether that is really the difference between the two cases the House of Lords may have to decide in some subsequent case. At any rate we must accept the decision of the House of Lords in *Excelsior Wire Rope Co.'s* case, which affirms a decision of the Court of Appeal. In both cases the person who started the machinery knew that children were likely to be about, so that apparently it cannot be said that the liability of the occupier to the trespasser depended on that fact.

Now, before going further, it would seem that a reading of the judgments shows that in the former case the judgment was based upon a finding that the infant victim was a trespasser, while in the latter case the infant victim was a licensee. In the former case the cable and sheave, or pulley, round which it ran were on land owned by the defendant and the evidence showed that at all times both infant and adult trespassers were warned off and indeed chased off. Lord Hailsham says in the *Addie* case:[5]

> But in my opinion, the findings of fact effectually negative that view. It is found that the appellants warned children out of the field and reproved adults who came there, and all that can be said is that these warnings were frequently neglected and that there was a gap in the hedge through which it was easy to pass on to the field. I cannot regard the fact that the appellants did not effectively fence the field or the fact that their warnings were frequently disregarded as sufficient to justify an inference that they permitted the children to be on the field, and, in the absence of such a permission, it is clear that the respondent's child was merely a trespasser.

In the latter case, the facts showed that the cable and pulley were on land on which the defendant only had a licence of occupation and that this land was not only adjoining and in no way separated from a public playground, but was the most attractive spot on or near the grounds for children to play games, the pulley being in or close to a clump of bushes and near a stream in which

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[4] *Mourton* v. *Poulter*, [1930] 2 K.B. 183, at p. 190.
[5] [1929] A.C. at pp. 369-70.

there were fish upon which the children might and did try their skill as anglers. The stone slab upon which was mounted the axle post of the sheave or pulley was the customary "home" for the children's games of hide-and-seek. In these circumstances the infant victim was held to be a licensee. As Viscount Dunedin says:[6]

> The appellants here had the right to keep children away from the sheave, and if it had been necessary I would have been prepared to find that the children were licensees in the sense of the decided cases, because I think that the word 'licensee' in the cases that have to do with this subject, though not probably a perfectly accurate word, is certainly intended to include another class, if you so call it, which I may coin a word to represent — namely, a permittee. And, though the ground on which the post stood did not belong to the appellants, yet the post was in their charge and it was they who permitted the children to use the post as they did.

Where does the so-called doctrine of allurement fit into this picture? It is quite clear that since the injuring agency in each of these cases, the cable and sheave or pulley, was almost identical, the fact that the mechanism would be the kind of thing that children would be attracted to play with had no real bearing on the case. It is submitted, however, that the factor of allurement may have a bearing on the determination of two points that have a crucial importance in such cases. First, it may be a factor in deciding whether the infant was a trespasser or a licensee, and, secondly, if the infant is a licensee it may be decisive of the question whether the injuring agency constituted a trap.

The origin of the allurement theory is the famous turntable case.[7] Of that case Lord Hailsham had this to say:[8]

> In the case of *Cooke* v. *Midland Great Western Ry. of Ireland* the railway company kept a dangerous turntable on their land close to a public road; the company knew that children were in the habit of playing on the turntable, to which they obtained easy access through a well-worn gap in a fence which the respondents were bound by statute to maintain; a child between four and five years of age having been seriously injured on the turntable, it was held that there was evidence for a jury of actionable negligence on the part of the railway company. . . . My Lords, in my opinion the decision in *Cooke's* case rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap; it therefore throws no light upon the question as to any duty owed by the occupier of premises to a trespasser.

Then a little further on he states the law as to trespassers as follows:[9]

[6] [1930] A.C. at p. 411.
[7] *Cooke* v. *Midland Great Western R.*, [1909] A.C. 229.
[8] [1929] A.C. at pp. 365-6.
[9] [1929] A.C. at p. 367.

> So far as English law is concerned it is sufficient to refer to the case of *Hardy* v. *Central London Ry. Co.*,[10] in which a child was injured on a moving staircase on the underground railway, where he had no right to be. Scrutton L.J. says: 'If the children were trespassers, the landowner was not entitled intentionally to injure them or to put dangerous traps for them intending to injure them, but was under no liability if, in trespassing, they injured themselves on objects legitimately on his land in the course of his business. Against those he was under no obligation to guard trespassers.' My Lords, I believe that that sentence accurately summarizes the English law.

This seems to make it clear that if the infant is a trespasser the fact that the injuring agency is the sort of thing a child would be allured to play with cannot be made the foundation of liability. In the same case Lord Dunedin, after dealing with the duty to trespassers, has this to say:[11]

> The truth is that in cases of trespass there can be no difference in the case of children and adults, because if there is no duty to take care that cannot vary according to who is the trespasser. It is quite otherwise in the case of licensees, because there you are brought into contact with what is known as trap and allurement. Allurement, I take it, is just the bait of the trap, itself a figurative expression. Hamilton L.J. deals with these expressions in *Latham*[12] and I need not quote, but obviously what is allurement and a trap to a child is not so to an adult.

That makes it clear that allurement has no bearing on liability to an infant trespasser, but may be decisive as to whether the injuring agency was a trap so as to entail liability to an infant licensee. Lord Dunedin continues:

> And then you have the doctrine of contributory negligence affecting an adult but not affecting a very young child. To take concrete instances: the learned judges in *Hardy's* case, the moving staircase, say explicitly that, if they could have held the children to be licensees, they would have held the defendants liable; yet an adult would have found no allurement in playing with the strap. In the present case, had the child been a licensee I would have held the defenders liable; secus if the complainer had been an adult.

That makes the point even clearer.

The other submission, that the fact that the injuring agency is an allurement might be a factor in determining whether the infant victim was a trespasser or a licensee, has no supporting authority in English law. But Scrutton L.J.[13] quotes an American authority, no less than Holmes J., in a passage which gives some support to the possibility of such a situation occurring:

[10] [1920] 3 K.B. 459, at p. 473.
[11] [1929] A.C. at p. 376.
[12] *Latham* v. *Johnson*, [1913] 1 K.B. 398, at pp. 415-6.
[13] *Liddle* v. *Yorkshire (North Riding) County Council*, [1934] 2 K.B. 101, at pp. 109-10.

> Holmes J., whose views on English as well as on American law are entitled to the most respectful consideration, has said in *United Zinc and Chemical Co. v. van Britt:*[14] 'Infants have no greater right to go upon other people's land than adults, and the mere fact that they are infants imposes no duty upon landowners to expect them and to prepare for their safety. On the other hand the duty of one who invites another upon his land not to lead him into a trap is well settled, and while it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied.' Again, on the following page he says: 'There can be no general duty on part of a landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there.'

In the case[1] in the Ontario courts which sparked this comment the facts were that the defendants had dug a trench alongside a church. Next to the church, and on the same side as the trench, was a vacant lot. Across the road was a playground for children. In the church basement was a recreation room to which children were permitted to resort for games, but the entrance and way of access used by the children to enter the room were fairly remote from the trench. There was some evidence that children had been interested spectators when the trench was being dug.

On the occasion giving rise to the action some children had entered the trench, when the workmen were away, to get sand to play with. The plaintiff's son was among them. In digging for sand in the wall of the trench he dislodged a large stone weighing some eighty pounds, which fell on him and at the same time caused a cave-in that buried him, and as a result he died. The plaintiff sued under the Fatal Accidents Act for damages for his death.

Schroeder J. dismissed the action, reaching his conclusion upon two grounds. First, he held that the infant was a trespasser. The evidence of children having watched the digging of the trench was not sufficient to translate him to the status of licensee, because it went no further than to establish at the most tolerance of the presence of the children on the vacant lot, and further because it failed to establish knowledge by persons who were in a position to grant a licence. Tolerance of the presence of the children was not sufficient. There must be evidence that the tolerance went further and amounted to tacit permission or licence. Secondly, the fact that mere labourers digging a ditch did not warn the children away did not establish that the landowner was aware of

[14] (1922), 258 U.S. 268, at p. 275.

the children's presence to such an extent that its failure to warn the children away amounted to permision or licence to the children to play there.

But it was argued that the fact of the children being at least licensed to go to and from the recreation room amounted to a licence to the infant to be on the church property and that, the trench being something that would allure children, it was in fact a trap under the so-called doctrine of allurement. Schroeder J. made an interesting answer to this argument. He first pointed out that the trench was outside the scope of the licence to visit the recreation room, since the entrance and way of access were fairly remote from the part of the trench where the accident occurred. He defined the duty of a licensor as a duty to warn the licensee against unusual dangers, and further defined an unusual danger as one which is unusual from the point of view of the particular licensee and the nature and extent of which a reasonable man, not familiar with the premises on which he is licensed to be, could not properly appreciate when exercising reasonable care for his own safety. He then continued:[15]

> Did this trench then constitute an unusual danger as I have defined it? Admittedly what happened occurred in broad daylight. It was a long, open trench, the existence of which was well known to this child, and the child did not fall into the trench but rather made a deliberate entry into it for his own private purpose, namely, to obtain some sand from the walls of the trench. The only possible ground on which the defendants could be found liable would be that this trench constituted an allurement, and then only if the child was a licensee. An allurement must possess qualities of fascination and danger and must partake in some degree of the nature of a trap. It may either tempt children to go on premises where they are not permitted to be, thus making trespassers of them, or it may tempt children licensed to be on the premises to meddle with the allurement. If I cannot be convinced that this trench constituted an allurement, then the plaintiff must necessarily fail in this action. There are many instances in the authorities of what have been held to constitute allurements, and it does seem to me that the doctrine is one which has already been pushed too far. In my opinion, the boy was in the trench not because he was 'allured' or 'attracted' to it but because he desired to procure sand, which he had no right to take: *vide Jannack* v. *Warren* (1926), 29 O.W.N. 434. In these days when building operations are more numerous than they were in the last few generations, it would be a dangerous thing to lay it down that every trench or excavation was an 'allurement'. I have not been advised by counsel of any authority in which a hole or trench on a vacant lot was held to be an allurement. In a very broad sense almost anything could be said to constitute an allurement to a child, but I find myself unable to come to the conclusion that the trench described in evidence in this case is an allure-

[15] [1950] O.R. at pp. 101-2.

> ment as defined by the authorities. Even if I am in error in holding that the infant was not a licensee in respect of the particular portion of the premises in which he met with the accident, I must hold that the plaintiff has failed, in any event, to establish to my satisfaction that the trench in question constituted an allurement.

All this seems to fit the so-called doctrine of allurement into its proper niche in the law governing the liability of a landowner. It seems quite clear that its main function lies in the determination of whether, if the infant victim of the casualty is a licensee, what is claimed to be an unusual danger or trap is in fact a trap *qua* the infant, because if the cause of the accident was something which would allure children, then it may be a trap *qua* the infant although it would not be *qua* an adult. There is also a suggestion that if the cause of the accident is an allurement for children then that factor may be taken into consideration in determining whether the infant victim was a licensee. As has been pointed out there is scant authority for this latter proposition. Indeed, it would seem contrary to the remark of Lord Sumner (then Hamilton L. J.) when he said:[16]

> . . . . it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so.

However, one cannot ignore the fact that courts have a tendency to lean towards finding excuses for infant peccadilloes and visiting the consequences of those excuses on persons on whose land they are injured. Although, therefore, a court may not expressly hold that the fact that the cause of the accident was an allurement made the infant trespasser a licensee, it may interpret the evidence of licence more favourably to the infant in the light of the magnetic quality of the allurement, and so really hold the infant to be a licensee because the temptation of the allurement was beyond the powers of infant resistance.

No comment on this point would be complete without a reference to the risk-duty approach so eloquently advocated by Mr. Peter Wright in recent comments in this journal.[17] The risk-duty approach is, of course, philosophic and, although the law is not always logical, it is rarely if ever philosophic. Perhaps it ought to be, but that is another story. The essential features of the risk-duty approach seem to be the ascertainment first of the extent of the risk of injury and then of the commensurate duty to combat

[16] *Latham* v. *Johnson* (*R*) *& Nephew Ltd.*, [1913] 1 K.B. 398, at p. 415; quoted by Schroeder J., [1950] O.R. at p. 96.

[17] (1948), 26 Can. Bar Rev. 867; (1949), 27 Can. Bar Rev. 338, 845.

that risk. It has been suggested earlier that by reason of allurement certain dangers that would be obvious in the case of an adult become traps where the victim is an infant, and possibly in certain cases the fact that the injuring agency would be an allurement to children might be a determining factor in deciding whether the infant was a licensee or a trespasser. In the risk-duty approach it would appear that the factor of allurement simply means that the risk of injury to children is thereby increased or made more probable and consequently imposes a higher duty to combat that higher risk. Now in the case of the owner or occupier of land it would seem that risk is divisible into two essential elements: first, the contemplation of the owner or occupier of the persons who may come on the land and, secondly, the nature and extent of the danger itself. So far, therefore, as allurement enters into the estimate of the risk the cases clearly show that it does affect the nature and extent of the danger if an infant is involved. But it would appear difficult to make allurement a factor in determining who the owner or occupier contemplated or ought to have contemplated as persons likely to come on the land and so within the scope of the danger. Every man is entitled to expect that others will obey the law. He is not bound to contemplate trespass. If, knowing of habitual trespass, he does nothing, then possibly his failure to prevent trespass may so greatly increase the risk of harm that the duty thereby created becomes equivalent to the duty owed to a licensee. Perhaps it might be better to put it the other way. If the element of risk of trespass is satisfied, then the element of risk of harm may be so high that the injury falls into the category of those dangers against which even a trespasser must be protected, that is, injury arising from such recklessness that it amounts to intentional, wilful or deliberate injury.[18] Although it might appear logical to take into account allurement as increasing the risk of trespass and so also the risk of harm, the courts have so definitely held that allurement cannot be made an excuse for trespass that, even if the risk-duty approach received the highest sanction, it could not be invoked to increase the duty owing to a trespasser.

So it would appear that the risk-duty approach lends no real

[18] *Adams* v. *Naylor*, [1944] 1 K.B. 750 (affirmed on another point, [1946] A.C. 543), would illustrate this point, though the majority of the Court of Appeal, holding the infant to be a trespasser, denied recovery. But the mine that killed the infant in that case, coupled with the drifting of the sand that had buried the fence and warning signs, would appear to have created a situation where the lethal quality of the danger and the probability of unintentional trespass display a recklessness equivalent to intentional injury. See the dissenting judgment of Scott L.J. on this point.

emphasis to the doctrine of allurement. Indeed it might assist in putting it in its proper place and prevent it from being pushed too far, as Schroeder J. says in the case commented on.

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DESERTED WIVES' AND CHILDREN'S MAINTENANCE ACT (Ontario) — APPEALS — AMOUNT OF DEPOSIT REQUIRED.— *Webb* v. *Webb*[1] is a decision of the Supreme Court of Canada that reverses the settled practice in Ontario by which an appellant husband was required to continue payment of maintenance pending the hearing of his appeal from a magistrate's order. The court allowed an appeal from the Ontario Court of Appeal and directed the issue of a writ of mandamus to the county court to proceed with the hearing of an appeal from a magistrate's order, notwithstanding that no payment of maintenance had been made pursuant to the order.

The Deserted Wives' and Children's Maintenance Act[2] provides that a magistrate may make an order for the payment by the husband of a weekly or monthly sum for maintenance. The Summary Convictions Act,[3] which applies to such proceedings, provides that an appeal may be taken to the county court and that Part XV of the Criminal Code (which includes section 730) shall apply, mutatis mutandis, to every such case. Section 730 of the Criminal Code provides that if the appeal is from an order whereby a sum of money is adjudged to be paid the appellant shall, within the time limited for filing a notice of intention to appeal, deposit with the justice making the order

> an amount sufficient to cover the sum so adjudged to be paid, together with such further sum as such justice deems sufficient to cover the costs of the appeal.

The question in *Webb* v. *Webb* was whether the requirements of section 730 were satisfied by the deposit only of the amount fixed as security for costs, no payment under the maintenance order appealed from having fallen due before the appeal was launched. Kerwin J., delivering the judgment of the court, held that the appellant was not required to deposit the sums falling due under the maintenance order from time to time. If one payment under the order had fallen due before the appellant had

[1] (1950), 96 C.C.C. 161.
[2] R.S.O., 1937, c. 211.
[3] R.S.O., 1937, c. 136.

filed and served his notice of appeal he would not have been required to pay anything more than that one payment.

The question of the amount of deposit required had previously given some trouble in the Ontario Court of Appeal. In *Fink* v. *Fink*[4] and *Johnson* v. *Johnson*[5] it was held that the county court had no jurisdiction to hear the appeal when the deposit had been made by unmarked cheque. In each case the question as to the amount of the deposit was left open by the court. However, it became the practice in Ontario to pay into court the amount of each instalment under the maintenance order as it fell due.

The question is obviously of considerable social importance because in the majority of cases the appellant has no means to satisfy a large sum of money and if the appeal is not heard promptly the arrears mount up to more than would ever be collected by the respondent, even if successful in the appeal. In the *Webb* case, weekly payments of $15.00 were to commence on March 1st, 1948. The judgment of the Supreme Court of Canada was delivered on January 30th, 1950. The arrears then amounted to $1,500 and the appeal to the county court judge had still to be heard. In the ordinary case the wife would have precious little chance of collecting these arrears and, of course, pending the final result would have nothing for her support.

It is not difficult to follow the reasoning of Mr. Justice Kerwin, but his conclusion is not the only possible one and it is unfortunate that the court should have decided a point of such great social importance, and have given a judgment reversing the Ontario Court of Appeal, without benefit of counsel. The appellant (husband) appeared in person and the respondent was not represented at all. It is submitted that the court should have called in the Attorney-General of Ontario or the Minister of Justice, or else have asked the Law Society of Upper Canada to provide counsel. A different and more socially equitable judgment might then have been given.

The proceedings under the Deserted Wives' and Children's Maintenance Act are of a civil nature and character (*Johnson* v. *Johnson, supra*). But as the proceedings are in the criminal courts, the rules of civil practice by which execution of the judgment is stayed pending an appeal obviously do not apply. The order of the magistrate therefore remains in full force and effect pending final disposition of the appeal. It is not stretching the imagination to argue that the "sum so adjudged to be paid" is the total of

[4] [1944] 2 D.L.R. 794; O.W.N. 172; 81 C.C.C. 196.
[5] [1948] 3 D.L.R. 590; O.W.N. 532; 91 C.C.C. 233.

all payments which would fall due until the county court judge would have an opportunity to deal with the matter, that is, for the period up to and including the sittings of the court to which the appeal is taken.

Another possible line of argument is suggested by *Twigg* v. *McClusker*.[6] There the Ontario Court of Appeal, where an order for payment of interim disbursements had not been complied with pending an appeal in an alimony action, struck the appeal off the list and pointed out that the appellant by his non-compliance with the order was in contempt of the court and that his appeal must be stayed until he had purged that contempt. Why could not the court in the instant case have said that the appellant was in contempt and have stayed his appeal until all arrears had been paid?

This latter argument is perhaps still open. It is to be hoped, however, that the legislature will see fit to deal with the subject and to provide some more appropriate procedure for appeals. After all, the family courts are designed for the expeditious settlement of family disputes and, more than in almost any other type of dispute, justice delayed is justice denied.

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The Coat Tails of the State

In this day and generation our most essential pre-occupation surely should be to keep right in the front of our minds every hour of every day the lesson which history has plainly taught, that of all the tyrannies of man over man the tyranny of Government is the easiest to create and the hardest to destroy; that while we must guard ourselves, and can guard ourselves, against enemies from without whom we can identify and meet, we must also guard with equal zeal against the well-meaning, misguided person living right among us who would lead us into dependence on the paternalistic State — the paternalistic State which is always ready to gather us in ever-increasing debility and stagnancy under its lordly wings. (From an address by the Rt. Hon. Arthur Meighen, "The Welfare State", to the British Columbia Bar Convention at Victoria, B.C., on June 29th, 1950)

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[6] [1947] O.W.N. 389.